



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7**

11201 Renner Boulevard
Lenexa, Kansas 66219

SENT VIA ELECTRONIC MAIL
RECEIPT CONFIRMATION REQUESTED

Duane Berning, President
ESE Alcohol Inc.
310 East Highway 96
Leoti, Kansas 67861
dberning@esealcohol.com

RE: Advisory Letter regarding compliance requirements with FIFRA, 7 U.S.C. §§ 136 *et seq.*
Request for Information pursuant to RCRA § 3007(a) and CWA § 308(a)
ESE Alcohol Inc., Leoti, Kansas

Dear Mr. Berning:

As you know, on March 15 and 16, 2021, the U.S. Environmental Protection Agency, Region 7, conducted inspections of the ESE Alcohol, Inc. (ESE) ethanol production facility located at 310 East Highway 96, Leoti, Kansas (Facility). ESE uses seed treated with pesticides to produce ethanol. ESE land applies the process wastewater and wet distillers' grain, or "wet cake," resulting from this process to nearby agricultural fields as fertilizer.

The EPA inspected the Facility to determine ESE's compliance with the Clean Water Act and the Resource Conservation and Recovery Act. As part of those inspections, the EPA collected samples from process wastewater, storm water, and wet cake stockpiled at the Facility. The preliminary results of those samples showed approximately twenty different pesticide residues. Our preliminary assessment indicates that for some of these pesticides, the levels detected may present a significant risk to ecological receptors and also exceed the EPA's aquatic life benchmarks.¹ These benchmarks are estimates of the concentrations below which pesticides are not expected to represent a risk of concern for aquatic life. The preliminary results are enclosed.

During the inspection, the EPA also collected Safety Data Sheets for some of the pesticide products sent to the Facility for processing. Because of the potential dangers posed by certain pesticides, the EPA regulates the registration, distribution, sale, and use of pesticides pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act. Some of the registered labels for the pesticide products received by the Facility state:

Excess treated seed may be used for ethanol production only if (1) By-products are not used for livestock feed; and (2) No measurable residues of pesticide remain in the ethanol by-products that are used in agronomic practice.

¹ See <https://www.epa.gov/pesticide-science-and-assessing-pesticide-risks/aquatic-life-benchmarks-and-ecological-risk>.

See, e.g., registered labels for APRON XL 350ES, EPA Reg. No. 100-1565, and AP2 Fungicide, EPA Reg. No.: 59639-186.

We are sharing this information given the high levels of pesticide residues detected in ESE's wet cake and wastewater and the label requirements restricting use in ethanol production for certain pesticide products sent to the Facility. Some of the pesticides detected are known to leach and may contaminate groundwater. Some of them are systemic and can be taken up into plant tissues resulting in residues in nectar and pollen that may harm pollinators or in leaves or other plant parts that are consumed by birds and mammals. Information on the profile and characteristics specific to each of the chemicals is available at: <https://iaspub.epa.gov/apex/pesticides/f?p=chemicalsearch:1>. **Because of the risks posed by these residues, the EPA is advising ESE to stop land application of wet cake and process wastewater immediately.**

In addition, the EPA is issuing the enclosed Request for Information to ESE pursuant to the authority of Section 3007(a) of RCRA, 42 U.S.C. § 6927(a), and Section 308(a) of the CWA, 33 U.S.C. § 1318(a). The EPA is requesting information related to the operation of the Facility, in part so that the EPA can better characterize the potential human health and ecological risks associated with the pesticide residues.

Section 3007(a) of RCRA authorizes the EPA to require any person who generates, stores, treats, transports, disposes of, or otherwise handles or has handled hazardous waste to submit information relating to such wastes. Section 308(a) of the CWA authorizes the EPA to require those subject to the Act to submit information and make reports as necessary to carry out the objectives of the CWA, 33 U.S.C. § 1251, *et seq.*

Under these authorities, the EPA requires ESE to submit the information in Enclosure A **within 30 calendar days** of receipt of this letter. Please read the instructions and definitions included in Enclosure A carefully before preparing a response. ESE must submit all required information under an authorized signature with the required certification found in Enclosure B.

ESE's response should be sent electronically to:

Edwin Buckner, Compliance Officer
buckner.edwin@epa.gov;

and

Hannah Lewis, Compliance Officer
lewis.hannah@epa.gov.

Please be advised that the failure to comply fully with this Request for Information may subject ESE to civil or criminal penalties under Section 3008 of RCRA, 42 U.S.C. § 6928, Section 309 of the CWA, 33 U.S.C. § 1319, and/or 18 U.S.C. §§ 1001 and 1341. We have also enclosed EPA's Small Business Resources Information Sheet, which may be helpful if ESE qualifies as a small business.

We appreciate your cooperation and prompt attention to his matter. If you have any questions, please contact Kasey Barton in the Office of Regional Counsel at (913) 551-7874.

Sincerely,

Diane Huffman
Acting Director
Enforcement and Compliance and Assurance Branch

Enclosures

1. Enclosure A – Request for Information & Instructions
2. Enclosure B – Statement of Certification
3. U. S. EPA Small Business Resources Information Sheet

cc: Tom Stiles, KDHE (via email)
tom.stiles@ks.gov

Ken Powell, KDHE (via email)
ken.powell@ks.gov

ENCLOSURE A

REQUEST FOR INFORMATION AND INSTRUCTIONS

RESPONSE DUE WITHIN 30 DAYS OF RECEIPT OF THIS REQUEST

The U.S. Environmental Protection Agency requires the submission of information, as described below, pursuant to Section 3007(a) of RCRA, 42 U.S.C. § 6927(a), and Section 308(a) of the Clean Water Act, 33 U.S.C. § 1318(a).

I. Instructions

1. Provide a separate response to each numbered request and label each response in a manner that identifies the number of the request.
2. Documents and data may be submitted electronically by email or by mail (e.g., on a compact disc or flash drive) in PDF, Word, Excel, or other widely available electronic format. *NOTE: as discussed below, any information claimed as confidential business information (CBI) should be submitted by mail and properly labeled or shared through an encrypted internet site.*
3. Where information or documents necessary for a response are neither in your possession nor available to you, indicate in your response why the information or documents are not available or in your possession, and identify any source that either possesses or is likely to possess the documents or information.
4. If information not known or not available to you as of the date of submission later becomes known or available to you, you must supplement your response. Moreover, should you find at any time after the submission of your response that any portion of the submitted information is false or incorrect, you must notify the EPA as soon as possible.
5. The Statement of Certification found in Enclosure B must be submitted along with your response and with any other submission made pursuant to this Request for Information. This statement must be made by a responsible official authorized to sign reports.
6. Information requested by this letter must be submitted to the EPA regardless of a claim of confidentiality. If you believe any of the requested information is confidential, you may assert a business confidentiality claim under the provisions of Section 3007(b) of RCRA, 42 U.S.C. § 6927(b), Section 308(b) of the CWA, 33 U.S.C. § 1318(b), and the regulations at 40 C.F.R. Part 2, Subpart B, and in the manner described at 40 C.F.R. § 2.203(b). Information that you claim confidential will be held as such pending a determination of applicability by the EPA. If no such claim accompanies the information when it is received by the EPA, it may be made available to the public by the EPA without further notice.
 - a. A business which is submitting information to the EPA may assert a business confidentiality claim covering the information by placing on (or attaching to) the information, at the time it is submitted to the EPA, a cover sheet, stamped or typed legend, or other suitable form of notice employing language such as *trade secret*, *proprietary*, or *company confidential*. Allegedly confidential portions of otherwise non-confidential documents should be clearly identified by the business and may be submitted

separately to facilitate identification and handling by the EPA. If the business desires confidential treatment only until a certain date or until the occurrence of a certain event, the notice should so state.

- b. To claim protection for information submitted to the EPA, you must be prepared to substantiate your claim in writing by demonstrating that the information meets the requirements in 40 C.F.R. Part 2, Subpart B, including, among others, the following criteria in 40 C.F.R. § 2.208:
 - i. Your business has taken measures to protect the confidentiality of the information, and it intends to continue to take such measures.
 - ii. No statute specifically requires disclosure of the information.
 - iii. Disclosure of the information would cause substantial harm to your business's competitive position.
- c. Please refer to 40 C.F.R. §§ 2.305 and 2.302, *special rules governing certain information obtained under the Solid Waste Disposal Act and the Clean Water Act*, regarding limitations on the confidential treatment of information obtained pursuant to RCRA § 3007(a) and effluent data and standards or limitations.

II. Definitions

All terms used in this Request for Information have their ordinary meaning unless such terms are defined in RCRA, 42 U.S.C. § 6901 *et seq.*, the CWA, 42 U.S.C. § 1251 *et seq.*, or applicable implementing regulations unless otherwise provided in this information request.

- 1. The terms “document” and “documentation” means any object that records, stores, or presents information, and includes: email; writings; memoranda; contracts; agreements; records; or information of any kind, whether handwritten or typed, or in computer format, memory, or storage device, or in hardcopy. All documents in hard copy shall also include attachments to or enclosures with any document.
- 2. The terms “ESE” or “ESE Alcohol” or “you” or “your” includes any assumed business names, agents, representatives, employees, contractors, or other entities that performed work or acted in any way on behalf of, are related to, or acted at the direction of ESE Alcohol Inc.
- 3. The term “Facility” means ESE’s ethanol production facility located at 310 East Highway 96, Leoti, Kansas.
- 4. The term “treated seed” means any seed to which a pesticide has been applied.

III. Information Requested

1. Identify each person who was consulted in preparing the response to this Request for Information including title, address, and email and/or phone number.
2. From January 1, 1998 to January 1, 2017, identify the product name for each treated seed product sent to the Facility and the company that provided each treated seed product to you.
3. From January 1, 2017 to the present:
 - a. Identify the name and address of each entity that has sent treated seed to the Facility, including the name, title, and contact information of a representative for each entity.
 - b. Identify the total amount of treated seed sent to the Facility by each entity per year.
 - c. Identify the total amount of treated seed processed by the Facility per year.
 - d. Provide shipping documentation (e.g., manifests, bills of lading, sales receipts, etc.) showing the quantity of treated seed sent by each entity to the Facility.
 - e. Identify the costs incurred or paid by ESE to each entity related to treated seed, on an annual basis, and any supporting documentation.
 - f. Provide a list of all pesticides that have been used to treat the seed sent to the Facility, and the Safety Data Sheet for each pesticide, excluding any SDS that were already provided to EPA during the March 12 and 15-16, 2021 inspection of the Facility.
 - g. Provide copies of the seed bag tag for each treated seed product sent to the Facility.
 - h. Provide any documentation that identifies the volume of each treated seed product sent by each entity to the Facility.
 - i. Provide any documentation that identifies the names of the pesticides applied to each treated seed product sent by each entity to the Facility, including which entity sent each pesticide product identified in the SDSs.
 - j. Identify the total amount of untreated seed sent to the Facility per year.
 - k. Identify the total amount of untreated seed processed by the Facility per year.
4. Provide all analytical sample results for the following:
 - a. Soil collected from areas where wet distillers' grain or wet cake is stored or stockpiled; and
 - b. Wet cake and process wastewater, including any pesticide sampling results.
5. Provide all records related to the land application of wet cake and process wastewater, including dates, locations, amounts applied, and corresponding soil sample analytical results.

6. Identify the methods and procedures used to land apply wet cake.
7. Describe the procedures for storing wet cake at the Facility, including any best management practices for managing stormwater runoff.
8. Identify the amount of wet cake that contains treated seed at the Facility and the location of the wet cake.
9. Identify any materials other than wet cake that are added to the windrow piles at the Facility.
10. Identify whether any process wastewater from the Facility (including truck wash water) is directed to the municipal sanitary sewer system. If yes, provide the total amount in gallons sent to the sewer system for each year from 2017 to the present.
11. Describe how process wastewater was disposed of and/or land applied prior to the year 2000 when center irrigation pivots were installed.
12. Identify whether process wastewater has been applied to the fields east of the Facility. If yes, provide the time periods this occurred, and the method of irrigation used.
13. Describe how treated seed not used in the ethanol production process is disposed of.

ENCLOSURE B

STATEMENT OF CERTIFICATION

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine or imprisonment for knowing violations.

Signature

Date

Printed Name

Title

U.S. EPA Small Business Resources Information Sheet

The United States Environmental Protection Agency provides an array of resources to help small businesses understand and comply with federal and state environmental laws. In addition to helping small businesses understand their environmental obligations and improve compliance, these resources will also help such businesses find cost-effective ways to comply through pollution prevention techniques and innovative technologies.

Office of Small and Disadvantaged Business Utilization (OSDBU)

www.epa.gov/aboutepa/about-office-small-and-disadvantaged-business-utilization-osdbu

EPA's OSDBU advocates and advances business, regulatory, and environmental compliance concerns of small and socio-economically disadvantaged businesses.

EPA's Asbestos Small Business Ombudsman (ASBO)

www.epa.gov/resources-small-businesses/asbestos-small-business-ombudsman or 1-800-368-5888

The EPA ASBO serves as a conduit for small businesses to access EPA and facilitates communications between the small business community and the Agency.

Small Business Environmental Assistance Program

<https://nationalsbeap.org>

This program provides a "one-stop shop" for small businesses and assistance providers seeking information on a wide range of environmental topics and state-specific environmental compliance assistance resources.

EPA's Compliance Assistance Homepage

www.epa.gov/compliance

This page is a gateway to industry and statute-specific environmental resources, from extensive web-based information to hotlines and compliance assistance specialists.

Compliance Assistance Centers

www.complianceassistance.net

EPA sponsored Compliance Assistance Centers provide information targeted to industries with many small businesses. They were developed in partnership with industry, universities and other federal and state agencies.

Agriculture

www.epa.gov/agriculture

Automotive Recycling

www.ecarcenter.org

Automotive Service and Repair

www.ccar-greenlink.org or 1-888-GRN-LINK

Chemical Manufacturing

www.chemalliance.org

Construction

www.cicacenter.org

Education

www.campuserc.org

Food Processing

www.fpeac.org

Healthcare

www.hercenter.org

Local Government

www.lgean.org

Surface Finishing

<http://www.sterc.org>

Paints and Coatings

www.paintcenter.org

Printing

www.pneac.org

Ports

www.portcompliance.org

Transportation

www.tercenter.org

U.S. Border Compliance and Import/Export Issues

www.bordercenter.org

EPA Hotlines and Clearinghouses

www.epa.gov/home/epa-hotlines

EPA sponsors many free hotlines and clearinghouses that provide convenient assistance regarding environmental requirements. Examples include:

Clean Air Technology Center (CATC) Info-line

www.epa.gov/catc or 1-919-541-0800

Superfund, TRI, EPCRA, RMP, and Oil Information Center

1-800-424-9346

EPA Imported Vehicles and Engines Public Helpline

www.epa.gov/otaq/imports or 1-734-214-4100

National Pesticide Information Center

www.npic.orst.edu or 1-800-858-7378

National Response Center Hotline to report oil and hazardous substance spills - <http://nrc.uscg.mil> or 1-800-424-8802

Pollution Prevention Information Clearinghouse (PPIC) -

www.epa.gov/p2/pollution-prevention-resources#ppic or 1-202-566-0799

Safe Drinking Water Hotline -

www.epa.gov/ground-water-and-drinking-water/safe-drinking-water-hotline or 1-800-426-4791

Toxic Substances Control Act (TSCA) Hotline

tsca-hotline@epa.gov or 1-202-554-1404

Small Entity Compliance Guides

<https://www.epa.gov/reg-flex/small-entity-compliance-guides>

EPA publishes a Small Entity Compliance Guide (SECG) for every rule for which the Agency has prepared a final regulatory flexibility analysis, in accordance with Section 604 of the Regulatory Flexibility Act (RFA).

Regional Small Business Liaisons

www.epa.gov/resources-small-businesses/epa-regional-office-small-business-liaisons

The U.S. Environmental Protection Agency (EPA) Regional Small Business Liaison (RSBL) is the primary regional contact and often the expert on small business assistance, advocacy, and outreach. The RSBL is the regional voice for the EPA Asbestos and Small Business Ombudsman (ASBO).

State Resource Locators

www.envcap.org/statetools

The Locators provide state-specific contacts, regulations and resources covering the major environmental laws.

State Small Business Environmental Assistance Programs (SBEAPs)

<https://nationalsbeap.org/states/list>

State SBEAPs help small businesses and assistance providers understand environmental requirements and sustainable business practices through workshops, trainings and site visits.

EPA's Tribal Portal

www.epa.gov/tribalportal

The Portal helps users locate tribal-related information within EPA and other federal agencies.

EPA Compliance Incentives

EPA provides incentives for environmental compliance. By participating in compliance assistance programs or voluntarily disclosing and promptly correcting violations before an enforcement action has been initiated, businesses may be eligible for penalty waivers or reductions. EPA has two such policies that may apply to small businesses:

EPA's Small Business Compliance Policy

www.epa.gov/enforcement/small-businesses-and-enforcement

EPA's Audit Policy

www.epa.gov/compliance/epas-audit-policy

Commenting on Federal Enforcement Actions and Compliance Activities

The Small Business Regulatory Enforcement Fairness Act (SBREFA) established a SBREFA Ombudsman and 10 Regional Fairness Boards to receive comments from small businesses about federal agency enforcement actions. If you believe that you fall within the Small Business Administration's definition of a small business (based on your North American Industry Classification System designation, number of employees or annual receipts, as defined at 13 C.F.R. 121.201; in most cases, this means a business with 500 or fewer employees), and wish to comment on federal enforcement and compliance activities, call the SBREFA Ombudsman's toll-free number at 1-888-REG-FAIR (1-888-734-3247).

Every small business that is the subject of an enforcement or compliance action is entitled to comment on the Agency's actions without fear of retaliation. EPA employees are prohibited from using enforcement or any other means of retaliation against any member of the regulated community in response to comments made under SBREFA.

Your Duty to Comply

If you receive compliance assistance or submit a comment to the SBREFA Ombudsman or Regional Fairness Boards, you still have the duty to comply with the law, including providing timely responses to EPA information requests, administrative or civil complaints, other enforcement actions or communications. The assistance information and comment processes do not give you any new rights or defenses in any enforcement action. These processes also do not affect EPA's obligation to protect public health or the environment under any of the environmental statutes it enforces, including the right to take emergency remedial or emergency response actions when appropriate. Those decisions will be based on the facts in each situation. The SBREFA Ombudsman and Fairness Boards do not participate in resolving EPA's enforcement actions. Also, remember that to preserve your rights, you need to comply with all rules governing the enforcement process.

EPA is disseminating this information to you without making a determination that your business or organization is a small business as defined by Section 222 of the Small Business Regulatory Enforcement Fairness Act or related provisions.